SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1927.

Katherine Linstead, Executrix of the Estate of John A. Linstead, Deceased, vs. The Chesapeake & Ohio Railway Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 20, 1928.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This was an action under the Federal Employers' Liability Act against the Chesapeake and Ohio Railway Company, of Virginia, by Katherine Linstead, as executrix, to recover damages for the death of her husband, who was a conductor in the employ of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, known as the Big Four, but who was working upon a freight train running upon the Chesapeake & Ohio Railway Company's tracks between Stevens, Kentucky, and Riverside, Ohio, near Cincinnati. The question in the case is, for whom he was working when he was killed, whether for the Chesapeake & Ohio Railway Company, the respondent, or the Big Four Company. He was one of a train crew of the Big Four Company composed of an engineer, a conductor and two brakemen. The Chesapeake & Ohio Company comes from the east to Cincinnati along the southern bank of the Ohio River and crosses that river at Cincinnati. The Big Four Company has no line in Kentucky but receives traffic and business from the Chesapeake & Ohio Company at Cincinnati, or near thereto on the north side of the river, delivering the traffic to the northwest. The terminal yard, so called, of the Chesapeake & Ohio reaches from a station called Stevens, in Kentucky, for some twelve or thirteen miles to Riverside, near Cincinnati on the Ohio side, and in this twelve or thirteen miles the Chesapeake & Ohio line passes five stations, called Brent, Altamont, Newport Waterworks, Brick

House and Cold Haven, and over an Ohio River bridge. It is con
venient for both railroads in the interchange of traffic to make a
arrangement by which the Big Four lends to the Chesapeake &
Ohio a locomotive and caboose and a train crew to take the freigh
trains that come into Stevens, Kentucky, from the east to th
Big Four Company at Riverside, Ohio, over the rails of the Chesa
peake & Ohio. The Chesapeake & Ohio does not pay the Bi
Four Company any rental for the lending of its locomotive an
caboose and crew in this matter, but it pays the consideration by
reciprocal service rendered to the Big Four by a train crew an
locomotive and caboose of the Chesapeake & Ohio. When the Bi
Four train crew and locomotive and caboose run on the track of th
Chesapeake & Ohio between Stevens and Riverside, near Cincinnati
they are furnished with time-tables and rule books of the Chesa
peake & Ohio Railway. They are under the supervision and control
so far as their work is concerned, of the train master of the Chesa
peake & Ohio Company, whose jurisdiction reaches from Stevens t
Riverside in the operation of the Chesapeake & Ohio road. The Bi
Four crew is not subject to discharge by any officer of the Chesa
peake & Ohio road. In the operation of the train over the Chesa
peake & Ohio line, they obey the signals of the switch tenders o
that company and comply with the rules for operation on its line
The Big Four crew attends to nothing while on the Chesapeake &
Ohio line but the train which it is sent over to Stevens to bring t
the junction point at Riverside on the Ohio side. All of the mem
bers of the train crew, including the deceased, were paid by th
Big Four Company.

On the morning of the accident, Linstead, the deceased, a
conductor, had brought over his crew with the Big Four locomotive
and caboose to Stevens, had attached the locomotive and caboose t
a train of cars containing twenty-two loads and eighteen empties
and was proceeding to take them to Cincinnati and the junction with
the Big Four road. The train had proceeded only a few miles
on the Chesapeake & Ohio track when it was overtaken and run
into by a commutation passenger train of the Chesapeake & Ohio
Company running from Stevens to Cincinnati and back again. It
was a train operated by the Chesapeake & Ohio Railway for the
convenience of early morning passengers, and was not on the time
table. It was called the "Chippy". Linstead was in the caboose

at the rear of his freight train. The caboose was shattered to pieces and Linstead was killed.

The trial was had in the District Court in Kentucky, held at Covington, and in the charge the Court used this language, which was duly excepted to:

"First, under the evidence here, you are authorized to believe you couldn't find otherwise, that the Chesapeake and Ohio Railway is a common carrier engaged in interstate commerce, carrying freight and passengers between the states.

"Second, under the evidence you would be authorized to find, you couldn't find otherwise, that the defendant, her husband, on the occasion of the injury was in the employ of the Chesapeake & Ohio Railway Company and engaged in interstate commerce work."

The result of the trial was a verdict for $16,500, upon which judgment was entered.

By writ of error, the case was carried to the Circuit Court of Appeals. That Court, by *per curiam*, reversed the judgment and remanded the case for further proceedings. The language of the Court was:

"We are unable effectively to distinguish the facts of this case from those of *Hull* v. *Philadelphia, etc., Ry.*, 252 U. S. 475,—an opinion which apparently was not brought to the attention of the trial court."

The judgment of the Circuit Court of Appeals was brought here by certiorari. 273 U. S. 690. The legal consequences of the relation between one in the general service of another who is in the special service of a third person are set forth in the case of the *Standard Oil Company* v. *Anderson*, 212 U. S. 215, 221. In that case the plaintiff was employed as a longshoreman by a master stevedore, who under contract with the defendant was engaged in loading a ship. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly lowered from a winch, and the question presented was whether the winchman whose negligence probably produced the injury was the servant of the owner of the ship or of the stevedore. After reference to the opinion of Chief Justice Shaw in the case of *Farwell* v. *Boston & Worcester Railroad Corporation*, 4 Metcalf, 49, this court said that the master was answerable for the wrongs of his servant, not because he

had authorized them nor because the servant in his negligen conduct represented the master, but because he was conductin the master's affairs, and the master was bound to see that h affairs were so conducted that others were not injured, and tha this principle rested on the great principle of social duty adopte from general considerations of policy and security. The opinio continues:

"The master's responsibility cannot be extended beyond th limits of the master's work. If the servant is doing his ow work or that of some other, the master is not answerable for h negligence in the performance of it.

"It sometimes happens that one wishes a certain work to b done for his benefit and neither has persons in his employ wh can do it nor is willing to take such persons into his general serv ice. He may then enter into an agreement with another b that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those me became *pro hac vice* the servants of him to whom they are fu nished. But, on the other hand, one may prefer to enter into a agreement with another that that other, for a consideration, sha himself perform the work through servants of his own selection retaining the direction and control of them. In the first case, h to whom the workmen are furnished is responsible for their negli gence in the conduct of the work, because the work is his work an they are for the time his workmen. In the second case, he wh agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the con duct of it, because, though it is done for the ultimate benefit o the other, it is still in its doing his own work. To determin whether a given case falls within the one class or the other we mus inquire whose is the work being performed, a question which i usually answered by ascertaining who has the power to contro and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary coopera tion, where the work furnished is part of a larger undertaking."

Now the work which was being done here by Linestead and hi crew was the work of the Chesapeake & Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railway between Stevens and Cincinnati. It was work for which the Chesapeake and Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio

Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four road paid the wages of Linstead and his crew or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Company for the performance of this particular job.

The case of *Hull* v. *Philadelphia & Reading Railway Company*, 252 U. S. 475, which controlled the view of the Circuit Court of Appeals, is to be distinguished from this. In that case, Hull, the plaintiff's deceased, was in the employ of the Western Maryland Railway Company as a brakeman and was killed. The Western Maryland Company was an interstate carrier operating a railway from Hagerstown, Maryland, to Lurgan, Pennsylvania, at which point it connected with a railway owned and operated by the defendant, the Philadelphia & Reading Railway Company, which extended from Lurgan to Rutherford in Pennsylvania. By arrangement between the two companies, through freight trains were operated from Hagerstown to Rutherford, one half over one line, and one-half over the other, and each company ran its own locomotives and freight trains over the united line from Hagerstown to Rutherford, observing the rules of each company on its respective line. It was held that Hull was not a servant of the Philadelphia & Reading Company, by which he was killed, but only the servant of the Western Maryland Company. That was because the work which Hull was doing was the work of the Western Maryland Company, even though it was carried on for a part of the way over the rails of the Philadelphia & Reading Company. The locomotive belonged to the Western Maryland Company, the cars belonged to the Western Maryland Company and the loads that were carried were being carried for the Western Maryland Company, and presumably the rates which were received for the transportation were the receipts of the Western Maryland Company. In other words, the whole line between Hagerstown and Rutherford was exactly as if it had been jointly owned by the two companies, and jointly used by them for their freight trains. Therefore the work was done by the Western Maryland for itself

and the mere transfer of the train owned by the Western Maryland and operated by it on to the rails of the Philadelphia & Reading Railway did not transfer the relation of the deceased from the general employment of the Western Maryland to a special employment by the Philadelphia and Reading as another master.

In the present case there was such a transfer and the line over which the transportation was effected and on which the work of transportation was done by the deceased was the line of the Chesapeake & Ohio, which was master and remained in charge of the operation, with the immediate supervision of the Big Four crew which was lent for the very purpose of doing the work of the Chesapeake & Ohio.

For these reasons, the judgment of the Circuit Court of Appeals must be reversed and the judgment of the District Court of Kentucky restored.

A true copy.

Test:

Clerk, Supreme Court, U. S.